

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

ABBOTT LABORATORIES, et al., \* Case No. 17-CV-3095(CBA)  
\*  
Plaintiffs, \* Brooklyn, New York  
\* July 10, 2017  
\*  
v.  
\*  
H&H WHOLESALE SERVICES,  
INC., et al., \*  
\*  
Defendants. \*  
\*  
\* \* \* \* \*

TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE  
BEFORE THE HONORABLE LOIS BLOOM  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 (Proceedings commenced at 3:51 p.m.)

2 THE CLERK: Civil cause for status conference,  
3 docket no. 17-CV-3095, Abbott Laboratories, et al. against  
4 H&H Wholesale Services, Inc., et al. Will the parties please  
5 state your names for the record.

6 MR. POTTER: Good afternoon, Your Honor. Jeffrey  
7 Geoffrey Potter and Timothy Waters for Abbott.

8 MS. BIRGER: Good afternoon, Your Honor. Laura  
9 Berger and Alan Levine for the H&H defendants.

10 THE CLERK: The Honorable Lois Bloom presiding.

11 THE COURT: Good afternoon, Mr. Potter, Mr. Waters,  
12 Mr. Levin and Ms. Birger. How's everybody today?

13 MS. BIRGER: Very good, Your Honor.

14 MR. WATERS: Good.

15 THE COURT: Can you believe that people would not  
16 be prepared for a plea?

17 MS. BIRGER: I was stunned.

18 MR. WATERS: I know Mr. Greenberg. He's a very  
19 fine lawyer. I don't know why he had his real estate partner  
20 here.

21 THE COURT: You know, again, I know it's off topic,  
22 but the Federal Defenders are the best attorneys that we see.

23 So to see somebody who is of modest means hire an  
24 attorney and they are not even here -- she surrendered last  
25 Thursday.

1                   So the idea that on the worst day of her life she  
2 doesn't have anybody advising her, again, I'm sure that Mr.  
3 Greenberg -- I don't know him at all. But I'm sure that he  
4 met with her but still -- anyway.

5                   I'm sorry I digress, but that's why we're behind  
6 today.

7                   MR. WATERS: No, we saw. We were here. We  
8 understand.

9                   THE COURT: SO this is a status conference in  
10 plaintiff's action against H&H and on June 16th, defendant  
11 filed a motion to impose a protective order against  
12 plaintiffs to exclude from the seized documents those that  
13 were turned over to United Lex that don't reference Freestyle  
14 marks and plaintiff has now responded.

15                  Those are ECF entries 31 and 32.

16                  And the plaintiffs are requesting that the motion  
17 be denied without prejudice and that the parties be ordered  
18 to meet and confer.

19                  I held a telephone conference on June 22nd and I  
20 denied defendant's motion without prejudice and I did order  
21 the parties to meet and confer and, unfortunately, it appears  
22 that the parties have not been able to resolve their  
23 disputes, and specifically the parties have not been able to  
24 agree to search terms and date restrictions.

25                  And I was going to be holding this conference by

1           telephone. However, by letter dated July 7th, plaintiffs  
2           asked that the conference be held in person.

3           I had my law clerk call to Ms. Berger, or Mr.  
4           Levine, to ask if that would be on consent and so we  
5           converted it to an in person conference, which I'm glad,  
6           because I never got to meet the two of you. I've only heard  
7           you as disembodied voices on the phone.

8           So I've gone over the letter requests and I  
9           understand, I believe, what is at issue here.

10           And I didn't think that it was going to do a whole  
11           lot to tell you to come back at a different time. I think  
12           we're going to have the same dispute to resolve no matter how  
13           much time goes into it.

14           So I could tell you a couple of things right off  
15           the bat, Ms. Birger.

16           That when H&H argues that the 2015 case discovery  
17           was restricted to documents related to the importation of  
18           FreeStyle strips in 2014, while the 2017 action concerns the  
19           alleged importation of domestic counterfeit strips after the  
20           injunctions, I'm not really going for those limits. Let me  
21           tell you why.

22           The 2015 case wasn't actually limited to 2014. It  
23           was before you took over the case and we did a sampling, a  
24           random sampling, in the international case.

25           And H&H said that for that one year where we asked

1 for the sampling, that they had 6,000 responsive documents.

2 And so H&H, through its prior counsel, made a huge  
3 fuss that it would be unduly burdensome for them to produce  
4 every year that everybody else was producing.

5 And so it wasn't that the 2015 case was limited to  
6 2014. That was them begging that their client not be put  
7 through the ringer and now Abbott, of course, is requesting  
8 that there be a more expansive search done.

9 Let me also say that I find it somewhat unrealistic  
10 of you to think that whatever they find in the one case is  
11 not going to be used in the other case. I don't think there's  
12 anything in the rules to support that.

13 I already gave an example at an earlier conference  
14 of a case by Magistrate Judge Moses in the Southern District,  
15 and I don't see that there's any support for your proposition  
16 that if they find something in the other case, that they're  
17 not going to be able to use it at the deposition, for  
18 instance, of Mr. Goldman.

19 So those two things -- I'm just giving you my  
20 inclination off the bat of that just didn't strike me as  
21 you're in a strong position to make those arguments.

22 As far as agreeing to search terms and production  
23 parameters -- one of the other points -- and let me just make  
24 sure, you did get the letter that was filed under seal on  
25 July 10th, today?

1 MS. BIRGER: Yes, we did, Your Honor.

2 THE COURT: Okay. I'm making sure, because when I  
3 see it's under seal, I get nervous that they may not have  
4 seen it.

5 MR. WATERS: We always email those out, Your Honor.

6 THE COURT: Okay. Very good.

7 It seems that there could be an agreement made as  
8 to terms, that they weren't going to agree to limit it just  
9 to the FreeStyle marks, as you were insisting. It looks like  
10 a core concern is Holland Trading.

11 And so, again, I would like to hear some argument  
12 on why we couldn't come to an agreement. They're not going  
13 to let it be just FreeStyle marks. Holland Trading seems to  
14 be a real concern for legitimate reasons.

15 So what can we work out here, Ms. Birger?

16 MS. BIRGER: So there's a couple of things, Your  
17 Honor. And just so that you know, we did discuss  
18 specifically this issue in an attempt to reach some  
19 resolution with Abbott.

20 One thing to keep in mind is the distinction  
21 between the seizure order and discovery in this case.

22 And I think that's particularly important to the last point  
23 that Your Honor made about Holland Trading.

24 The fact is that the seizure order, as Judge Amon  
25 limited it, is to matters that refer or relate to merchandise

1 bearing the FreeStyle marks.

2 So if, for example, there were conversations with  
3 FreeStyle about, gee, should we start to do business with you  
4 with regard to other products, or products in general, it's  
5 actually not within the scope of the seizure order. Full  
6 stop.

7 Now, does that mean that it's not a concern to  
8 them? They couldn't serve a discovery request under Rule 26  
9 and we could have a conversation? No. Of course, not.

10 But that doesn't mean that they're entitled under  
11 the seizure order to just take it from our server without us  
12 having the opportunity to review and have that conversation.

13 THE COURT: Let me say I can agree with you, but  
14 what would be the outcome?

15 If they were to serve the discovery request --

16 MS. BIRGER: Your Honor, we actually told them.  
17 We've given them already the Holland Trading documents that  
18 we have. That's not the issue.

19 The issue is whether Holland Trading should be the  
20 subject of search terms being used for the protective order.

21 And, in fact -- I mean, not for the protective  
22 order. For the seizure order.

23 And, in fact, they're not even willing to limit it  
24 to Holland Trading, because we asked them with regard to date  
25 restrictions. They said well, at least for documents that

1 have to do with Holland Trading we would want to go back  
2 earlier.

3 And I said to them we might be able to agree on  
4 longer date restrictions for Holland Trading, if, in fact,  
5 there was a reasonable date restriction for other documents.

6 And they said oh, no, no. That we don't want to  
7 do, but refused to propose a date restriction at all for  
8 other documents, but said for Holland Trading they want to go  
9 back all the way. And so --

10 THE COURT: Well, again, I'm the one that asked the  
11 question, so you should get back on track of what you wanted  
12 to present to me.

13 MS. BIRGER: Sure.

14 THE COURT: I follow you that there is a  
15 distinction between the seizure order and what would be  
16 relevant within discovery context.

17 My question was so what difference would it make?  
18 If they have to make a specific request and they know it  
19 exists, other than you now winning the victory of the day,  
20 what difference would it make in the long run here?

21 MS. BIRGER: There's two differences?

22 One is going forward they're continuing to  
23 implement the seizure order. And we think the search terms  
24 should be designed to get to what Judge Amon allowed under  
25 the seizure order. Documents referring to the FreeStyle

1 marks.

2 That is separate, frankly, from willingness to  
3 produce Holland Trading documents. So that is the first  
4 thing.

5 THE COURT: As far as implementing the seizure  
6 order, the seizure order, in my mind, has already been  
7 implemented.

8 MS. BIRGER: And that's just it, Your Honor.

9 It hasn't. They've taken the server. They have all of our  
10 documents, but they are continuing to search them, via their  
11 vendor, and cull them out and take them.

12 So --

13 THE COURT: And they've produced them to you.

14 MS. BIRGER: Well --

15 THE COURT: The vendor produces them --

16 MS. BIRGER: But that's the dispute we're having,  
17 right?

18 THE COURT: Okay.

19 MS. BIRGER: So the dispute is that if we see  
20 documents on there -- the difference under the two scenarios  
21 that Your Honor presented is under Rule 26, if we said yes,  
22 we'll give you documents having to do with Holland Trading,  
23 we would do what any party does. We do search terms. We  
24 gather the documents. We review for privilege. We turn them  
25 over.

1                   Under the seizure order, they get to tell United  
2 Lex you know what we'd like to see? We'd like to see  
3 anything that has to do with -- and this is exactly what Mr.  
4 Potter tolw me he's doing. We'd like to see anything that has  
5 to do with counterfeit documents. We'd like to see anything  
6 that has to do with Holland Trading.

7                   And then United Lex runs some search terms. We  
8 don't know what they are. We do get to see the documents,  
9 but under the current scenario, we have the right to withhold  
10 any, other than on grounds of privilege.

11                  And so we're not reviewing for responsiveness.  
12 We're not reviewing for responsiveness for a document request  
13 that tap ins what it is we're supposed to be responding to.  
14 That is a practical difference.

15                  And since the seizure order is not complete, it is  
16 a live thing that is happening on a daily basis, setting  
17 parameters for what they're entitled to get that way matters  
18 to us, Your Honor.

19                  That is fundamentally the difference and that is  
20 why it is so important to draw a distinction between the  
21 seizure order and discovery.

22                  And to some extent this is a tempest in a teapot  
23 with regard to Holland Trading because the very first thing  
24 they asked for was Holland Trading documents, and they got  
25 them, before we first realized that they were getting stuff

1           that didn't refer to FreeStyle marks. So --

2           THE COURT: Well, their argument is that the  
3           Holland Trading documents do relate to FreeStyle marks. I  
4           know that's going to be their argument.

5           MS. BIRGER: It may be, Your Honor, but the fact  
6           is Holland Trading sells a number of products.

7           And so their argument is not that all the Holland  
8           Trading documents relate to the FreeStyle marks, but that  
9           they think it's important to their claim, because they'd like  
10          to establish the length of the relationship with Holland  
11          Trading, the nature of the relationship with Holland Trading,  
12          how it evolved, long before --

13           THE COURT: Well, again, the argument that was put  
14          in the letter that was sent to me said that there is some  
15          information in the documents that there was -- prior to the  
16          counterfeit there was some relationship and -- between  
17          Holland Trading and H&H.

18           MS. BIRGER: That's true.

19           THE COURT: And so, again, they're trying to show  
20          when the decision was made, and when they knew that there  
21          were counterfeit goods that were being traded.

22           MS. BIRGER: So, again, Your Honor -- and I don't  
23          mean to cut you off. I apologize.

24           THE COURT: You're not.

25           MS. BIRGER: Again, Your Honor, then it's

1           important to look at their complaint. And they are saying  
2           they want to trace the history because it's relevant to their  
3           showing of perhaps willfulness or of how the relationship  
4           evolved.

5           But their actual allegations are that the  
6           counterfeiting started in reaction to the injunction that was  
7           entered in October of 2015 and the first documented instance  
8           of any sale is at the very end of 2016.

9           And you may recall our first proposal to Your Honor  
10          on the telephone was that the protective order should start  
11          at January 1, 2016.

12           In an effort to meet and confer, we have moved back  
13          to October 9, 2015.

14           THE COURT: But the argument being -- and again,  
15          that they could have amended the original action that they  
16          had to supplement to these new allegations against H&H.

17           So they first were investigating the international  
18          boxes, and then when they found out that there was, in their  
19          mind, counterfeiting going on regarding domestic strips, they  
20          could have amended but for -- because they were asking for a  
21          seizure order, it wouldn't have been under seal, and it would  
22          have exposed your client.

23           If what you're saying is they've now found other  
24          things that date back further, they could certainly amend  
25          their complaint, Ms. Birger, couldn't they?

1                   MS. BIRGER: Of course, they can amend their  
2 complaint, and I'm not suggesting that.

3                   But I don't think that's what they're saying.

4                   THE COURT: Well --

5                   MS. BIRGER: I think what they're saying is they  
6 found instances of conversations with H&H and Holland Trading  
7 about selling product, and that to be fair, the documents  
8 they're talking about are H&H making sure that the H&H  
9 products are legitimate and being -- the way they're reading  
10 them, alert to the idea that there could be counterfeiting.

11                  So let's put it in context. It doesn't change the  
12 allegations they're making, which is that the counterfeiting  
13 starts much later.

14                  THE COURT: Mr. Waters, do you want to respond?

15                  MR. WATERS: Sure.

16                  So, Your Honor, I think in terms of the differences  
17 between the seizure order and discovery there's a big issue  
18 there that's not being addressed, which is counterfeiters who  
19 are subject to an ex parte seizure order can't be allowed to  
20 say these documents over here are outside the scope of the  
21 seizure order. You can't see them. I won't give you  
22 meaningful information about them but trust me, these are  
23 outside the scope.

24                  And I say that, Your Honor, because we have an idea  
25 what these documents are that they're withholding. They

1 still refuse to show it to us. They gave us a log that gives  
2 us no information; less information than a privilege log.

3 United Lex, under the seizure order, they are  
4 correct. Page 6 of the seizure says United Lex gets all the  
5 documents. United Lex does the review. United Lex determines  
6 what's related to referring to FreeStyle and they produce  
7 those documents.

8 So what we're facing and what this dispute arose  
9 from is United Lex made that determination. H&H objects to  
10 it. They're objecting to it unilaterally. They're trying to  
11 overturn it without giving any information to the court or to  
12 us.

13 If United Lex went off the rails, we want to  
14 address it, but we can't do it in the blind.

15 THE COURT: So your suggestion was, as was  
16 implemented in the other case, that they allow you to review  
17 whatever those documents are, but that there not be any  
18 waiver of any privilege or any other objection that they may  
19 make, but then you wouldn't be in the dark as to what they're  
20 withholding.

21 MR. WATERS: Absolutely.

22 If you want to use the Federal Rules, as an  
23 example, Rule 26, for inadvertent production. We get the  
24 documents. They say it's outside the scope. We sequester.  
25 We don't use it, except to resolve the dispute until the

1 dispute is resolved.

2 THE COURT: And why would that not work here, Ms.  
3 Birger?

4 MS. BIRGER: Because, Your Honor, the question is  
5 what's in the scope and what isn't. And again, keep in mind  
6 all we're asking for are search terms.

7 Let's just go back to what Mr. Waters just said  
8 about United Lex.

9 Judge Amon did not say I am delegating the power to  
10 decide what's within the scope of the seizure order of some  
11 vendor.

12 THE COURT: I'm following you.

13 MS. BIRGER: Okay.

14 THE COURT: I understand, but look. You're coming  
15 to me and asking me to make a determination, and I'm more in  
16 the blind than United Lex is.

17 MS. BIRGER: Your Honor, again, here is the  
18 proposal we made the Abbott and I will make it to you. We  
19 should be searching for all documents that talk about  
20 FreeStyle or all documents that talk about Abbott and let's  
21 see where that leaves us.

22 That should get you documents referring or relating  
23 to the FreeStyle marks. It's very broad.

24 THE COURT: I don't think that's true. And I'll  
25 tell you why.

1                   By analogy, since this is all in my mind analogous  
2                   to a Fourth Amendment search warrant, okay? We frequently  
3                   get drug deals --

4                   MS. BIRGER: This is true.

5                   THE COURT: -- where the tapes are not talking  
6                   about drugs, but are talking about other things.

7                   MS. BIRGER: So, Your Honor, for this reason,  
8                   actually, I suggested that Abbott should propose search terms  
9                   that they think work, because if, in fact, you think there's  
10                  a code or something -- the question still remains how to make  
11                  this work.

12                  THE COURT: So I thought that that's what had been  
13                  proposed, Ms. Birger, and maybe I'm wrong. I thought that  
14                  there had been counterfeit or any version of counterfeit.

15                  I thought that when they asked for there to be  
16                  something regarding Holland Trading, that's because their  
17                  best lead is that Holland Trading was involved in the  
18                  counterfeiting that they're saying H&H has perpetrated.

19                  So I thought that in addition to the marks that  
20                  you're talking about, that those are not not suggestions that  
21                  in my mind go so far afield from these subject matter of what  
22                  Judge Amon had allowed.

23                  MS. BIRGER: That may be, Your Honor, as to the  
24                  word "counterfeiting."

25                  As to Holland Trading, there would be the

1           intermediate step of if Holland Trading were used, or  
2           Holland, or some combination of it as a search term, there  
3           still needs to be then a responsiveness to termination like  
4           you would do under Rule 26. Does this actually refer to the  
5           FreeStyle marks, or let me give you an example  
6           hypothetically.

7           Let's say a different company's products were being  
8           bought from Holland Trading, not theirs, it would hit on the  
9           search terms and they should not see it. They should not see  
10          what their competitors are doing with H&H.

11          And so that's where we are asking for some sort of  
12          give in play here. There need to be search terms and there  
13          need to be some sort of responsiveness review and that's why  
14          Rule 26 works better than the seizure order for stuff other  
15          than the FreeStyle marks because it solves that problem.

16          Otherwise you have the trouble of if you use Holland  
17          Trading as a search term and you come up with documents where  
18          one of their competitors is selling product through Holland  
19          Trading to my client, that's going to hit on the search terms  
20          and they don't want to trust us on withholding it. I  
21          understand that. But it's also completely outside the scope  
22          of the seizure order.

23           MR. LEVINE: Okay.

24           THE COURT: Yes, Mr. Waters.

25           MR. LEVINE: Your Honor, United Lex says they're a

1 vendor.

2 So if you don't proceed with search terms, then  
3 they -- Patterson Belknap is calling the play into its vendor  
4 on a continuing basis. We don't know what instructions are  
5 being given. There's no record of what they're asking for.

6 And it becomes an open source, if you will, of  
7 document discovery that is beyond our review. And a seizure  
8 order is very limited legally. It's limited to the language  
9 of the order because it creates a seized product like in a  
10 search warrant.

11 And I've had lots of search warrants, Your Honor --

12 THE COURT: Your only problem is he wrote that  
13 order that Judge Amon signed.

14 MR. LEVINE: I know that. Which is why --

15 THE COURT: That's your problem.

16 MR. LEVINE: Which is why he should be held to the  
17 words that he used.

18 And there are by analogy lots of criminal cases  
19 where a search warrant is executed against a company and  
20 immediately after the search warrant, within a couple of  
21 weeks, the government then serves grand jury subpoenas to get  
22 specifically documents or information that were beyond the  
23 scope of the language of the search warrant. Because the  
24 search warrant is -- the government is held to the language  
25 of its search warrant.

1                   Mr. Potter, now the way he is interpreting this,  
2 isn't held to the language of the seizure order. Of, if you  
3 will, he's held to the broadest possible reading of it which  
4 is not reviewable.

5                   THE COURT: Well, ths is the part that you had me  
6 on. The part me on was that United Lex is their vendor.  
7 That I completely understand. That they are working with  
8 their vendor to supply the documents. That I got.

9                   But let me just say to you you're moving for a  
10 protective order in a -- so we're talking apples and oranges  
11 here. Because usually when we're talking a protective order  
12 we're talking discovery.

13                   In fact, I've done research. There are not  
14 protective orders granted under seizure orders. There just  
15 aren't. So you're asking me for something in the context of  
16 the seizure order where it really is a device to limit a  
17 discovery tool.

18                   MR. LEVINE: We also asked -- and Ms. Birger can do  
19 this -- we also asked in our original filing on this to --  
20 there is Section 6(d)11.116 --

21                   THE COURT: 116(d)(7).

22                   MR. LEVINE: (d)(7)?

23                   THE COURT: Yes.

24                   MR. LEVINE: Which does allow for limiting the  
25 production of documents to confidential --

1                   THE COURT: Private, proprietary or privileged.

2                   MR. LEVINE: So those --

3                   THE COURT: But it doesn't say to relevance.

4                   MR. LEVINE: No. But --

5                   THE COURT: Does not say to relevance.

6                   MR. LEVINE: But we are -- our position is, Your  
7 Honor, that the business of H&H would hypothetically with  
8 Holland Trading beyond the products is confidential and  
9 proprietary to H&H with Holland Trading and beyond the  
10 language of the order. And so we are not --

11                  THE COURT: I am following what you're saying.

12                  MR. LEVINE: -- we are not trying to prevent the  
13 discovery ultimately of the documents.

14                  We're looking to move the playing field of the  
15 dispute about what they get from an environment in which they  
16 call the plays and we have no idea what plays they called in.  
17 We're just looking at the documents from that environment to  
18 one where they ask us to produce something.

19                  We do a search. We have a discussion about he  
20 language of their request. We asked them over and over again  
21 for search terms. They refused to give us proposed search  
22 terms.

23                  THE COURT: And they say --

24                  MR. LEVINE: Their view is, Mr. Potter's view is  
25 related and referring means everything.

1                   THE COURT: Mr. Levine, I know that you're very  
2                   passionate and it works well for you.

3                   But let me just say, okay, they're saying that they  
4                   were willing to talk to you about search terms but that  
5                   you're insisting that the only search term be the marks. And  
6                   so between the two sides there's an impasse. And my whole --  
7                   how do I say this tactfully -- I have more cases than just  
8                   Abbott Labs.

9                   MR. LEVINE: We're aware.

10                  THE COURT: So I have to get a resolution here that  
11                  will work. I can't have it be that every day's an Abbott  
12                  Lab. day.

13                  And as much as I know that this is important to all  
14                  the players, in a certain way you're right. This is just  
15                  maneuvering. And they're saying you're holding the cards  
16                  because when you United Lex is giving you the documents,  
17                  you're not giving them information like you would be required  
18                  to in a privilege log as to why you're withholding the  
19                  document. You're just not giving them.

20                  MS. BIRGER: Just to be clear, Your Honor, that's  
21                  not what we're doing. Since the last conference, we actually  
22                  did generate a log.

23                  They think -- what they want to know is they want  
24                  to see the documents and then decide. But we told them the  
25                  vast majority at this point that we have been pulling out

1 have been until we resolve the date restriction issue -- and  
2 we specifically identified for them by control number -- it's  
3 only been withheld because it --

4 THE COURT: Is it really all about the date and not  
5 relevance?

6 MS. BIRGER: No. But more than half, probably more  
7 than two thirds of the current stuff. Some of the earlier  
8 things --

9 THE COURT: Wait. Wait. Wait. Wait. Half or two  
10 thirds of the current stuff is being held --

11 MS. BIRGER: Meaning that --

12 THE COURT: -- because of date or relevance?

13 MS. BIRGER: Let me -- yes -- no -- of date -- and  
14 the reason why is this.

15 The Holland Trading stuff and other things were  
16 front loaded. They told United Lex to prioritize that stuff  
17 clearly.

18 And so what we have been doing -- and we have given  
19 them a log and we will update it every time -- just pending a  
20 ruling from the court or an agreement on what they know what  
21 we're doing is we're telling by document by document why we  
22 withheld it.

23 And we say very specifically there is no mention of  
24 the Freestyle marks anywhere in this document. Or we said  
25 this document predates October 9th, 2015 --

1                   THE COURT: But I don't buy the October 9th date.

2                   MS. BIRGER: Okay.

3                   THE COURT: And I'm telling you that right now.

4                   That's the date that they filed for the injunction. And  
5                   it may be a problem with their complaint, but I don't buy  
6                   that that's the relevant date for purposes of them getting to  
7                   see documents.

8                   MS. BIRGER: So, Your Honor, the issue is this.

9                   They're telling us that they'll agree on a date  
10                  restriction, but it's got to go back several years.

11                  And given the theory of their case, which is that  
12                  something happened after October 9th, 2015 that caused a  
13                  change in behavior there is zero reason to go back years from  
14                  that. Even if you go back a few months, Your Honor, you  
15                  don't go back years. There's nothing. They don't have any  
16                  instance of any counterfeit sale until December, 2016.

17                  THE COURT: Look, can I be very direct with you?

18                  MS. BIRGER: You absolutely can.

19                  THE COURT: So it seems to me that your client had  
20                  terrible counsel out of the gate, and that there were  
21                  representations made both to plaintiff and to the court that  
22                  have now been undermined by other things that have happened.

23                  And so you're fighting on both of these fronts. Ms.  
24                  Birger. I want to be clear with you about that. You're  
25                  fighting the big behemoth, Abbott Lab, with Mr. Waters and

1           Mr. Potter, but you're also fighting that your client, H&H,  
2           made representations in the other case that it sounds like  
3           now have come back to bite them.

4           And so for me I can only go on what I'm being  
5           given. If you're saying that half or two thirds of the  
6           documents are now being withheld because of the date, I don't  
7           know what the date range is that you're withholding anything  
8           before that October 9th, 2015. If that's what this is all  
9           about --

10           MS. BIRGER: No.

11           THE COURT: Again, I know that they allege that H&H  
12           began the counterfeiting conduct in 2015. That's what the  
13           complaint says. Mr. Waters, Mr. Potter --

14           MS. BIRGER: They allege it began at the end of  
15           sometime in 2016, but that the impetus for it started after  
16           October 9th, 2015. That's the allegation, not to interrupt.

17           The only thing -- the only reason I reference the  
18           why, Your Honor, is in response to the idea that they have no  
19           reason why we're withholding documents. It's simply not  
20           true. We told them. And again we've only been withholding  
21           them pending a resolution of this issue which we have been  
22           pushing and trying to resolve.

23           THE COURT: Except that, Ms. Birger, again, if this  
24           was a discovery dispute, you'd be on the losing end of the  
25           battle.

1 MS. BIRGER: But it's not, Your Honor.

2 THE COURT: So let them turn it into one and then  
3 I'm saying what's the difference?

4 MS. BIRGER: But, Your Honor, they haven't. And  
5 that's because they like it the way it is. They like the  
6 fact that they have complete control and we have no say in  
7 it. They could serve discovery requests.

8 THE COURT: And, quite frankly, if they served the  
9 discovery request and you're withholding them based on  
10 relevance, what will the difference be?

11 MS. BIRGER: But, Your Honor, the difference is  
12 that when you have a discovery request, you don't withhold on  
13 the basis of relevance. You object on the basis of  
14 relevance. And then you have a meet and confer and you  
15 resolve it or you bring a discovery dispute to a judge. You  
16 don't have this free-form then going to a vendor dealing with  
17 --

18 THE COURT: I understand that.

19 MS. BIRGER: I know we keep circling.

20 THE COURT: I understand that. But I sort of feel  
21 that we'll be at the same place.

22 MS. BIRGER: I don't think we would, Your Honor.  
23 And obviously we told them. And particularly that you hit it  
24 right out of box on the Holland Trading stuff.

25 I think, frankly, given the representation they've

1           made to us that we would be hard-pressed to say to them that  
2           Holland Trading isn't relevant. They told us they think that  
3           Holland Trading has been selling our client counterfeit  
4           goods. So you wouldn't hear that from us. We'd go away,  
5           Your Honor.

6                         THE COURT: And I don't really understand why H&H  
7           would be trying to protect the proprietary information of  
8           somebody -- again, I understand it shouldn't be that I'm  
9           putting the onus on you.

10                  But since it's you moving for the protective order,  
11           and since there is no protective order in the regular sense  
12           under the federal rules -- and really we're dealing with a  
13           section under the seizure order where it says that if it's  
14           proprietary information -- but that's why I'm going back to  
15           that. Because it doesn't make sense to me that if H&H -- if  
16           you're protecting your client and you're going to say they  
17           were duped. This other company was selling them things.  
18           They had no idea they were counterfeit. Why would you be  
19           trying to protect that information?

20                  MS. BIRGER: Your Honor --

21                         THE COURT: I understand if there's other dealings  
22           with Holland Trading and it's not about the Abbott Labs  
23           product --

24                  MS. BIRGER: That's part of it.

25                         THE COURT: -- but if it's in conjunction in the

1 same e-mail that they're talking about three different  
2 products, I don't see how you're going to avoid turning it  
3 over.

4 MS. BIRGER: So, Your Honor, I agree with you. If  
5 it were talking about FreeStyle and something else, then we  
6 would have to turn it over. At the very least maybe we'd be  
7 having an argument about redactive. But I understand that.

8 That's not what we're talking about here. We're  
9 talking about other documents. And, frankly, we're talking  
10 about whether it's within the scope of the seizure order for  
11 them to get say the genesis of the relationship with Holland  
12 Trading.

13 They wrote to Your Honor in this morning's letter  
14 that they understand from deposition testimony that there was  
15 a dinner at one point between representatives of Holland  
16 Trading and representatives of our client.

17 And frankly, Your Honor, e-mails about that dinner  
18 don't concern the FreeStyle marks. They don't. And so would  
19 they get it in Rule 26? They very well might. They very  
20 well might. It's a different issue.

21 THE COURT: Mr. Potter.

22 MR. POTTER: We seem to be arguing about things  
23 that just are outside the scope of reality.

24 We now know a little bit, but most of these e-  
25 mails have been withheld. That there was an extraordinary

1 meeting with people flying from Europe to Troy, Michigan.

2 One does not go from Europe to Troy, Michigan for any other  
3 purpose but to meet with H&H.

4 And they met with the person who was in charge of  
5 buying the test strips, and not a person who was at all  
6 involved in any other of the products that they claim that  
7 they might have possibly, hypothetically, could have  
8 considered buying from this Holland Trading Group.

9 And we know there were e-mails because there's just  
10 a little bit of information about it. They just refer to  
11 them. What is the phrase they use? Client development or  
12 client relations. That's all I know.

13 But I assume, because I asked and got no answer,  
14 that these e-mails are, in fact, planning this extraordinary  
15 meeting --

16 THE COURT: Why does it matter?

17 MR. POTTER: Well, because I want to know who was  
18 at the meeting because I'm going to want to have to take  
19 depositions. I'm going to want to know who came from Holland  
20 Trading. I'm going to want to be able to pull out of that --

21 THE COURT: And how about their point? Why can't  
22 you just ask those questions?

23 MR. POTTER: Because when I asked them questions at  
24 their depositions -- and I don't have documents -- they lied.  
25 We have a long --

1                   THE COURT: You haven't taken the deposition yet  
2                   though. Have you?

3                   MR. POTTER: All but I have of H&H.

4                   THE COURT: I understand in the other case you took  
5                   the deposition, not in the 17--

6                   MR. LEVINE: I mean, in --

7                   THE COURT: No, he didn't interrupt you. You don't  
8                   get to interrupt him.

9                   MR. POTTER: In Mr. Gulaff's (ph), David Gulaff's,  
10                  I asked him at his deposition --

11                  THE COURT: But that was in the 15 case.

12                  MR. POTTER: Right. But I asked him who he was  
13                  buying the international -- who he was buying domestic strips  
14                  from. And he lied to me.

15                  THE COURT: Can I just ask why -- now knowing what  
16                  I know what you know, why can't you just serve requests on  
17                  them?

18                  MR. POTTER: Your Honor, we're concerned -- because  
19                  when we served requests in this case, we have not gotten the  
20                  responsive documents. The work that United Lex has been  
21                  doing has been very good and it --

22                  THE COURT: I'm sure it has.

23                  MR. POTTER: Well, Your Honor, but that's the  
24                  thing. We have gotten documents from them. And in none of  
25                  those documents can they identify as being outside the scope

1 of the seizure order.

2 THE COURT: Look, Mr. Potter, everybody wishes that  
3 they could have a United Lex. Okay.

4 And the only reason why you have a United Lex is  
5 because of the type of case that allows for this  
6 extraordinary power where the court has ordered them to be  
7 the intermediary.

8 But I can assure you that Judge Amon had no idea  
9 what search terms or how this would all unfold. She was  
10 signing an order that was presented to her in a case where  
11 there were allegations of counterfeiting going on and it gave  
12 you very broad, extraordinary power to go into H&H and take  
13 their server. And from that time forward, it's now my  
14 problem. Okay.

15 So both of you are talking about how, you know, on  
16 your end of it, Unite Lex is doing a great job. On their end  
17 of it, that United Lex is unilaterally making determinations  
18 that feeds you everything. Because they're your vendor, they  
19 want to be hired again and they have an interest in pleasing  
20 you. You didn't say all that but it's --

21 MR. LEVINE: They actually have the information  
22 about that dinner from the deposition testimony two weeks ago  
23 in a --

24 THE COURT: Who is they?

25 MR. LEVINE: Mr. Abbott has it.

1                   THE COURT: Mr. Potter?

2                   MR. LEVINE: Mr. Potter asked Mr. Goldman about  
3                   that dinner. Mr. Goldman testified about that dinner,  
4                   testified who was at that dinner, testified what that dinner  
5                   was about. So they actually don't need the documents to find  
6                   out about that dinner.

7                   THE COURT: Well, that was just one example he was  
8                   saying of why he moved this information.

9                   MR. LEVINE: I understand. But it's disappointing  
10                  to me, Your Honor, that misrepresentations are being made  
11                  about what the evidence is in the case.

12                  THE COURT: Let's not start with that.

13                  Misrepresentations is not where you want to go with H&H as  
14                  your client. Okay. Yes.

15                  MR. LEVINE: Your Honor, the TRO in the case  
16                  provides that in addition to the documents that are produced  
17                  by United Lex -- and remember this is extraordinary.  
18                  Congress made findings in passed special legislation to deal  
19                  with people that sell counterfeits and that's why this is  
20                  different and that's why there is a United Lex.

21                  THE COURT: But remember that we put this off until  
22                  September to have the hearing. So you have more than enough  
23                  time that you could make these requests if you don't think  
24                  that you're getting the information that you're entitled to.

25                  MR. LEVINE: Well, we also have -- the court also

1 issued a TRO that requires that these documents be produced  
2 by H&H. They haven't been produced by H&H. H&H produced  
3 some invoices with Holland Trading, but the e-mails and  
4 documents behind it have only come to us through United Lex.

5 So we have -- they had the opportunity to produce  
6 the documents. They were required to produce the documents  
7 in an expedited timeframe. Obviously, they've had more time  
8 to do it. That hasn't worked. We haven't gotten the  
9 documents that way.

10 What we have been getting from United Lex are  
11 documents that are not only exactly called for by the seizure  
12 order -- and I'd like to, if I may, just read into the record  
13 the paragraph, the operative paragraph on paragraph 6 of the  
14 seizure order to show how broad it is in the seizure order  
15 and how descriptive it is in the seizure order itself, that  
16 if we pick up these meetings and other similar things that  
17 are being held back, even if they don't specifically mention  
18 FreeStyle marks on it.

19 And it had been working fine. The problem we're  
20 having here --

21 THE COURT: You wanted to read into the record the  
22 paragraph.

23 MR. LEVINE: Yes.

24 THE COURT: You wanted to read into the record  
25 paragraph 6.

1                   MR. LEVINE: "Ordered that United Lex may review  
2                   all documents, communications, computer files and electronic  
3                   data seized pursuant to this order, to identify documentation  
4                   relating or referring in any manner to the manufacture,  
5                   promotion, publicity, advertising, receiving, acquisition,  
6                   importation, return, shipment, purchase, sale, offer for sale  
7                   for distribution of any merchandise bearing the FreeStyle  
8                   marks on a rolling basis, and shall provide those documents  
9                   to counsel for H&H."

10                  And then there's a procedure for review of things  
11                  on the basis of privilege.

12                  And all of the documents we've received not only  
13                  meet that criteria in a very narrow way, but they're also  
14                  relevant, it turns out, almost every one of them to the  
15                  actual counterfeiting itself.

16                  And as we now are starting to piece together in the  
17                  few documents we have is that H&H had a constant  
18                  communication with Holland Trading and rejected their product  
19                  that were not stated in writing, but stated over telephone  
20                  calls based on the e-mails we should have a call about that  
21                  up until the time of the court's order being entered.

22                  We think that if we can go through and see these  
23                  documents they will help us show and prove that this  
24                  counterfeiting was done willful. This is a --

25                  THE COURT: Can I just stop you for one second?

1                   ECF number 10 is an expedited discovery order that  
2       says the parties may immediately serve discovery requests and  
3       that there had to be an expedited response. This was when we  
4       still thought that we were going forward on the expedited  
5       basis to the hearing.

6                   Why can't we employ some discovery to meet this  
7       need instead of arguing today, tomorrow, the next day, about  
8       the terms and whether you're getting what you're supposed to  
9       get?

10                  MR. POTTER: Your Honor, my concern is given the  
11       history of discovery in this case -- and this is something  
12       that Congress thought about in passing this legislation -- is  
13       that we cannot rely upon H&H to make production.

14                  THE COURT: Let me just say H&H was represented by  
15       different counsel --

16                  MR. POTTER: They still are represented by that  
17       counsel. They are counsel of record. They attended the  
18       deposition. They are on the telephone calls. They're not  
19       here today.

20                  THE COURT: But let me just say to you because this  
21       has now been put off for some time, the urgency that you're  
22       coming, the frequency and the urgency that you're coming to  
23       me about the case doesn't seem to serve the parties well.

24                  I do understand, Mr. Potter, what your argument is;  
25       that they did not produce what they were supposed to produce.

1           And that again you're saying that the seizure order affords  
2           for a much broader production than they believe it does.

3                 I also understand that because United Lex took the  
4           server that you have no problem getting the documents from  
5           United Lex. You only have a problem because there's a  
6           process by which it has to go through Ms. Birger and Mr.  
7           Levine's hands so they're holding up the documents.

8                 I got the whole gist of what is going on here. My  
9           problem here is I understand that it's an extraordinary  
10           mechanism that Congress has put into hands of plaintiffs like  
11           your clients.

12                 But I also understand that by putting off any  
13           hearing on that TRO until September, that that built in a  
14           little more time for the parties to get at whatever it is  
15           that they need to get at here.

16                 You already have enjoined them from selling any of  
17           the product. They're not getting any more product to put on  
18           the market. So the urgency that they may be flooding the  
19           market with counterfeit goods in your client's name has been  
20           forestalled.

21                 So my real question to you is if we can't get the  
22           parties to agree on terms, knowing that Ms. Birger is making  
23           the argument to me that if this was made as a discovery  
24           request they wouldn't have any legs to stand on. She said  
25           that. She didn't say it that way.

1 MS. BIRGER: Not quite that way, Your Honor.

2 THE COURT: But she said if you had made the  
3 discovery request for all the documents relating to the H&H  
4 client relations with Holland Trading --

5 MR. POTTER: Well, she said she'd object to it, and  
6 then wed be back here.

7 THE COURT: But she wouldn't get anywhere with me.

8 MR. POTTER: Okay.

9 THE COURT: She wouldn't get anywhere with me.

10 Her one point that is well taken with me, but I  
11 have nothing I can do, is that protective orders are not  
12 generally written about in this realm and in the realm of a  
13 seizure order.

14 And it's probably because the seizure orders are  
15 going to be put to the test through the hearing in a very  
16 short period of time.

17 And so these sort of arguments back and forth just  
18 don't happen with any frequency, because either the company I  
19 guess has shut down after the seizure and they put their  
20 hands up or they just are not moving for -- there are no  
21 cases on protective orders within this area of a seizure  
22 order.

23 So I guess it doesn't help or hurt you in any way.  
24 I'm just saying that they're asking for something that I  
25 don't find any basis for in the case law.

1                   But on the flip side, I understand their argument  
2                   that there is a difference between discovery and seizure.

3                   And what you're entitled to in the seizure may or may not be  
4                   everything that United Lex is making this determination is  
5                   within the scope. I don't know. I haven't looked at any of  
6                   the documents.

7                   So I could do a couple of things. I could force  
8                   you to go back to the table after this conversation where  
9                   they know that I'm not going hold up that date. I don't know  
10                  what the right date is, but I'm not going to hold up that  
11                  date as the right date, the date that you filed.

12                  Two, I've already said that I believe that the e-  
13                  mails or the relations between H&H and Holland are fair game  
14                  and that they shouldn't be throwing up roadblocks and saying  
15                  that they want to protect the confidentiality of that.

16                  Because I think that that -- even though it may in some  
17                  respects have more basis in 15 United States Code 1116(d)(7)  
18                  because that refers to confidential, private, proprietary or  
19                  privileged information. I really can't see why they would  
20                  want to protect somebody who's selling them counterfeit  
21                  goods.

22                  But that being said, my inclination is to throw you  
23                  back to each other to get this worked out in a way that there  
24                  are search terms built in that both sides may not be happy  
25                  with, but could agree to.

1                   You don't think it's going to work, Mr. Waters?

2                   That's what your face says.

3                   MR. WATERS: The difficulty is is the documents  
4                   that are being withheld.

5                   What we can agree would not get picked up on search  
6                   terms because all they are are discussions about the stuff  
7                   that's coming.

8                   So until we could see these documents, know what it  
9                   is, understand their relevance, and we can do other search  
10                  terms that would pick up similar documents and things like  
11                  that --

12                  THE COURT: So what do you think? We're going to  
13                  raid as a search term "the stuff"?

14                  MR. POTTER: No, that's the problem. Because the  
15                  way it works, Your Honor, when you or I are reviewing our own  
16                  documents on line, you start broad and you say, my goodness,  
17                  there's now a series of transactions here. And you look to  
18                  see the e-mail dealing with the transactions.

19                  You've got deliveries and you say, oh, my goodness,  
20                  these are deliveries are going through such and such a  
21                  freight forward, are located in Florida. And then they're  
22                  setting up escrow payments and other discussions of getting -  
23                  - how we're going to get this stuff cleared through customs,  
24                  so on and so forth. This is all about the same transaction.

25                  And what we assume is going on with United Lex is

1           they are doing -- as we told the court they would -- in real  
2           time figuring out what these transactions are and providing  
3           their documents.

4                         As far as we know, those are the documents that are  
5                         being held up. If we can see the documents that they're  
6                         holding on the grounds of relevance, we can figure out where  
7                         this has gone wrong if, in fact, they're not part of  
8                         (indiscernible). And these are not privileged documents.  
9                         These are issues of relevance.

10                  We're happy to enter into any sort of protective  
11                         order so we can understand what it is that we're trying to do  
12                         here. If we just say documents that use the magic word  
13                         FreeStyle we're not going to pick it up and we know that.

14                  MS. BIRGER: Your Honor, Mr. Potter just made our  
15                         argument for why this should be done under Rule 26. Because  
16                         when parties are served with discovery requests, they start  
17                         broad. They look at their own documents. They talk to their  
18                         client. They find the relevant documents. They turn them  
19                         over.

20                  The problem is --

21                  THE COURT: Ms. Birger, I assume that all of the  
22                         documents that you have gotten from United Lex will  
23                         ultimately have to be turned over.

24                  MS. BIRGER: I'm not sure that's quite right.

25                  THE COURT: Maybe it isn't.

1                   MS. BIRGER: Many of them may be withing the scope  
2                   of Rule 26, but there are documents that are not about  
3                   Abbott.

4                   MR. POTTER: Your Honor, we need to see those  
5                   documents so we can know what's wrong. We'll look at a  
6                   written copy in their office.

7                   This is a seizure order. They are unilaterally  
8                   refusing to let us see documents seized on their say so.  
9                   Their log is a joke. It didn't have the date of the document  
10                  or anything else.

11                  THE COURT: And I just ask though -- so these have  
12                  been produced since May on a rolling basis.

13                  How much more is there to be produced?

14                  Again, I'm asking in quantity, because a server  
15                  could have unlimited amount of information on it and this has  
16                  been produced since May. Am I correct? Since May there's  
17                  been --

18                  MS. BIRGER: Yes, Your Honor.

19                  THE COURT: There's been rolling documents.

20                  MS. BIRGER: Yes.

21                  And, Your Honor, the answer from our perspective is  
22                  we don't know because what's happening -- and, again, this is  
23                  the problem is that when Mr. Potter and Mr. Waters have a new  
24                  theory, a new idea, a new lead, they go back to United Lex  
25                  and United Lex is doing something and then a new rolling

1 production comes out.

2 THE COURT: But I don't really care about that, Ms.  
3 Birger. And what you're telling me on both sides is putting  
4 me in the position that now you're going to produce all the  
5 documents to me and then I'm going to say whether or now they  
6 should be turned over, and God knows that's not what I want  
7 to do.

8 MS. BIRGER: Nobody wants to impose that on you,  
9 Your Honor, but I'm trying to forthrightly tell the court,  
10 because we don't know what they're looking for and they've  
11 been unable in our meet and confer to come up with search  
12 terms, because as Mr. Potter just candidly acknowledged, he  
13 wants what he wants. But he can't define it and he wants to  
14 keep going back to the well and poking around and looking for  
15 things.

16 But on the flip side of that argument is only  
17 because this has come up in a seizure context, where it's  
18 their vendor that's getting the documents and turning them  
19 over to you, if it was you looking for the very same  
20 documents, you wouldn't have -- I said a leg stand on.

21 MS. BIRGER: Your Honor, we wouldn't be filing.

22 THE COURT: You would not have a reasonable basis  
23 to be withholding them.

24 So, again, I'm saying why then are we going through  
25 this exercise in futility?

1                   MS. BIRGER: And the answer is this, Your Honor.  
2                   The answer is this. There is a certain lack of trust. I  
3                   understand Abbott's lack of trust of my client, but  
4                   similarly, Mr. Potter and Mr. Waters have sued my client on  
5                   behalf of many other clients, not just Abbott, over the  
6                   years.

7                   And so there is a reluctance to turn over documents  
8                   that are not responsive to document requests with letting  
9                   them have free access. That's it, Your Honor.

10                  THE COURT: And Ms. Birger, if you looked at -- and  
11                  I don't know how many there are, but let's assume there are a  
12                  hundred documents, just to have a round number.

13                  MS. BIRGER: There's fewer, but yes.

14                  THE COURT: Okay. If you were to look at those  
15                  hundred documents and tell me that you're not turning over 20  
16                  of them because they don't have anything to do with FreeStyle  
17                  and they're about H&H dealing with other companies, or other  
18                  brands, or other merchandise, I could accept that.

19                  But that's not what you're saying.

20                  MS. BIRGER: That's not. I'm telling you there are  
21                  some documents that fit that description and then there are  
22                  other documents about say setting up a dinner with Holland  
23                  Trading, which we do not talk about the FreeStyle marks and  
24                  we think they're outside the scope of the seizure order.

25                  If there was a Rule 26 request for all documents

1           concerning communications with Holland Trading, we would have  
2           turned them over.

3           THE COURT: A Rule 34 request, not Rule 26, right?

4           MS. BIRGER: Sure. Sure.

5           THE COURT: 34. Why can't we just do that?

6           MR. POTTER: Sure. We will run into problems if we  
7           go 30 days out and we get objections, because then we won't  
8           have the documents in time for the hearing, but we'll deal  
9           with that at the time.

10          THE COURT: I thought the hearing's in September.

11          MS. BIRGER: It is.

12          THE COURT: And we're in July now. So if my 30  
13           days is right -- and you have to admit, I've given you quick  
14           access to the court if there's any problem to resolve.

15          MR. POTTER: Yes, Your Honor.

16          THE COURT: And I do have a good memory. Nothing  
17           else, but a good memory.

18          So I will remember today's conversation.

19          MR. POTTER: And we appreciate that, Your Honor.

20          THE COURT: The expedited discovery order, by the  
21           way, says a three-day turnaround.

22          And, again, I'm not saying that we should go under  
23           the expedited discovery order, because the expedited  
24           discovery order was done in light of the fact that the  
25           hearing was going to be held expeditiously, and now it's been

1 put off until September.

2                   But you see I think that the amount of energy  
3                   that's going into this is not a good use of the H&H dollar.

4                   Again, I understand that they already made their  
5                   bed a little bit before you and Mr. Levine came in, so I  
6                   can't make anything for them about that, the mistrust between  
7                   the parties.

8                   But I am in the position to say that I don't think  
9                   you're going to be able to hold onto the documents --

10                  MS. BIRGER: We understand.

11                  THE COURT: -- because it's talking about a dinner,  
12                  when there's other information that they have that that  
13                  dinner was somebody coming from Europe to meet with somebody  
14                  in Troy, Michigan about buying test strips.

15                  I don't think you're going to be able to --

16                  MS. BIRGER: We understand, Your Honor. We  
17                  understand. And you will not see us back in this courtroom  
18                  on a discovery request about those documents.

19                  I also have a good memory, and I know the court  
20                  does, and you just heard me say that.

21                  THE COURT: Okay. Good. Yes, Mr. Waters.

22                  MR. WATERS: So, Your Honor, I'll just point out  
23                  page 5 of the seizure order already has a -- basically a  
24                  document request.

25                  It's an order for them to produce documents on

1           their own related to FreeStyle. So that's already there.

2           That's already an obligation. They simply put that process  
3           on hold during this dispute. I think it's time for them to  
4           take it off hold and start producing those documents.

5                 Anything not covered on page 5, then we can discuss

6                 --

7                 THE COURT: Again, I'm not looking to make more  
8                 paperwork for your minions. I'm not.

9                 And I understand that part of the argument is  
10                whether it's related, or referred to, or any of that,  
11                because, again, the dinner with the person from Europe, I  
12                don't know if there are specific emails that you're really  
13                interested in that don't say a thing about FreeStyle and you  
14                still would want that email.

15                 So what I'm trying to say here is I think the  
16                writing on the wall, Mr. Levine and Ms. Birger, that your  
17                client is not going to be able to withhold these documents.

18                 I get your point about the unilateral, you know,  
19                Unitex -- United Lex. God, I'm coming up with new names.  
20                Not a bad one.

21                 MS. BIRGER: I think Unitex is actually a company.  
22                I feel like they make gloves or something.

23                 THE COURT: Maybe.

24                 But I understand what your point is that they  
25                shouldn't have the extraordinary power just because Judge

1           Amon signed a seizure to just feed everything to Mr. Waters  
2           and Mr. Potter.

3                 But I think that you're in a -- you're in a bit of  
4           quicksand here on the argument that you're not going to have  
5           to eventually turn these documents over.

6                 I don't think there's going to be any argument down  
7           the road, if they make these requests under 34 that  
8           documents, emails and they already have your listing of them.

9                 So I understand that you think it's a horse of a  
10          different color because of the distinction between the  
11          seizure and discovery, and I do understand that there's a  
12          live implementation of the seizure order still going on.

13                 And I've asked both sides how much more is there  
14          and nobody is able to tell me that. Is there a --

15                 MR. POTTER: Our sense is there's very little. The  
16          amount that they've produced so far, in terms of physical  
17          document --

18                 THE COURT: Is there a way that we would ask United  
19          Lex to tell us, since they have the server and that way I  
20          have a better understanding of whether or not we are fighting  
21          over a limited universe of documents, or it's going to keep  
22          going.

23                 MR. WATERS: Your Honor, part of the problem here  
24          is we haven't told United Lex -- (indiscernible) says  
25          FreeStyle, dump it on us. And then they get how many

1           thousands of documents and they have to review it for  
2           privilege.

3           We've explained -- we've said this to Judge Amon  
4           the first day. We explained our theory of the case. We  
5           think Holland Trading's the counterfeiting so, of course,  
6           they look for Holland Trading related FreeStyle documents.

7           If we were to say give us every document that says  
8           FreeStyle Abbott on it, then we'd have a huge dump.

9           I guess we can do that, but we haven't been going  
10          that route. We've been trying to be targeted so that we don't  
11          just capture every document on the server.

12          THE COURT: But both of you are telling me the same  
13          thing, Mr. Waters. That you have not given them search terms  
14          because you haven't been able to agree to search terms.

15          And you're saying it would be too broad, and  
16          they're saying that's the only -- or least your letter is  
17          saying that's the only search terms that they'd agree to, is  
18          that it has to have the FreeStyle mark.

19          And I'm saying I don't know what the answer is, but  
20          I think that there is a way to run around the backhand here,  
21          to do a forehand stroke, which is to serve the document  
22          request --

23          MR. WATERS: Okay.

24          THE COURT: -- since you already have the list of  
25          what they have. They've already said that they understand and

1           will remember that I'm not going to uphold them --

2           MR. WATERS: Got it.

3           THE COURT: -- from turning over those documents.

4           But I would like if there's any more that's going  
5           to come up regarding the seizure order, I would like  
6           something, whether it's an affidavit or it's you getting the  
7           information from your company, United Lex, that I know what  
8           are we dealing with here, because, again, I'm not saying that  
9           you haven't come to me on a worthwhile basis.

10           Both sides are using my time judiciously. I don't  
11          have any problem with both sides coming to me.

12           I do have a problem though because I'm in the dark.  
13          I don't know how many more documents they have to dump or how  
14          much more information. I've given you clear indication that I  
15          would not restrict it the way that you would want me to  
16          restrict it. That date is not going to be the operative  
17          date.

18           And as far as the distinction, which I do  
19          understand the argument and I did my own independent research  
20          and did not find any cases regarding protective order and  
21          seizures.

22           And I believe that's because usually the seizure  
23          order is quickly put through to a hearing and here's a delay  
24          that's been agreed to by the parties.

25           That's the only thing that I can really come up

1 with here.

2 MR. LEVINE: Your Honor, if they were in the nature  
3 of Rule 34 requests, then both sides would know what  
4 documents are being sought and there could be a professional  
5 discussion about what's producable and what's not.

6 And if Your Honor --

7 THE COURT: But Mr. Levine, it's not going to be a  
8 relevance objection.

9 MR. LEVINE: I understand.

10 THE COURT: And so all of these documents that are  
11 listed in -- I forget whether it's Exhibit A or whatever the  
12 attachment was to the letter today, the likelihood is you're  
13 not going to be able to withhold those and object.

14 MR. LEVINE: Your Honor, I hear Your Honor.

15 THE COURT: Okay.

16 MR. LEVINE: But the fact of the matter is that we  
17 don't know what the limits of the word "relevance" are now  
18 and we don't know what the limits are of Mr. Potter's and --  
19 request.

20 And so we've heard the court --

21 THE COURT: Well, I --

22 MR. LEVINE: We understand --

23 THE COURT: I also --

24 MR. LEVINE: We understand what the court --

25 THE COURT: -- I also do not want to make you give

1 another log because then we're going to be fighting about the  
2 log instead of getting the documents.

3 So look. I'm not going to their end result, which  
4 is give them all the documents without waiving any of your  
5 objections and let them come and be able to argue. I'm not  
6 jumping to that.

7 But I'm also giving you as clear an indication as I  
8 can that if they're making these requests and you're  
9 withholding them because you don't think they're relevant,  
10 that will not be upheld.

11 And so I'm saying -- and I do understand and I want  
12 to say to Mr. Waters and Mr. Potter so Mr. Levine, and Ms.  
13 Birger, I think you acknowledge are worthy opponents on a  
14 case like this.

15 And if you had a client like H&H and you came in  
16 when they came in on the case, they have to be able to do  
17 something to put their finger in the dike.

18 And so, again, I believe that their argument that  
19 the seizure order did allow for everything to be seized, but  
20 it didn't give United Lex full, unfettered discretion about  
21 everything gets turned over to Mr. Potter and Mr. Waters.  
22 That's why the documents first go through Mr. Levine and Ms.  
23 Birger. That's what the seizure says.

24 And I'm saying that I'm not going to be able to  
25 withhold their relevance objection, but I also know, because

1       we have this on file, expedited discovery order, which I am  
2       telling you you should negotiate because a three day  
3       turnaround doesn't seem to be fair and in everybody's  
4       interest.

5                 But I don't think that we have to keep fighting  
6       about it as the seizure order, unless somebody's going to  
7       tell me that there is some imminent danger right now to the  
8       public, and that it must be that everything that was seized  
9       gets turned over immediately for you to view in order to  
10      protect the public. Nobody's telling me that.

11               I think that we can handle it as a discovery  
12      dispute and if they made the same protective order  
13      application in a discovery dispute on the basis of relevance,  
14      I'd be able to deny their motion.

15               MS. BIRGER: We're find with that.

16               MR. LEVINE: Thank you, Your Honor.

17               THE COURT: So I guess I'm just kicking the can  
18      down the road, but I'm giving you both indications of where  
19      the court would come out and especially on the date, I've  
20      been clear with you, that I do not agree that the date of the  
21      filing is the date.

22               And I've also told you that the 2015 case wasn't  
23      actually limited to 2014. It was that H&H in their random  
24      sampling had 6,000 documents from 2014 so we didn't believe  
25      that they needed to turn over the rest at that time.

1                   THE COURT: Is there anything else that needs to be  
2 addressed on behalf of Abbott today?

3                   MR. WATERS: No, Your Honor. We'll promptly serve  
4 the discovery requests and we will be talking to our  
5 adversaries about the timing of objections and then  
6 responses.

7                   THE COURT: And, again, I don't think that -- I  
8 don't think there's going to be a different result, but to  
9 fight about search terms, just doesn't sound to me to be an  
10 efficient use of our resources at this time.

11                  Anything else on behalf of H&H today?

12                  MS. BIRGER: No, Your Honor.

13                  THE COURT: This matter is adjourned. Thank you.

14                  MR. WATERS: Thank you.

15                  (Proceedings concluded at 4:55 p.m.)

16                  I, CHRISTINE FIORE, court-approved transcriber and certified  
17 electronic reporter and transcriber, certify that the  
18 foregoing is a correct transcript from the official  
19 electronic sound recording of the proceedings in the above-  
20 entitled matter.

21  
22 

23 \_\_\_\_\_ July 18, 2017

24                  Christine Fiore, CERT  
25                  Transcriber